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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 794

IN THE MATTER OF:

RAINBO EXPRESS, INC.,

BANKRUPT.

JAMES B. RICHARDSON, TRUSTEE,

Petitioner,

vs.

NATIONAL ACCEPTANCE COMPANY OF CHICAGO,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ELI F. SEEBIRT,
650 Associates Bldg.,
South Bend 1, Indiana,
Attorney for Petitioner.

ROBERT L. OARE,
PAUL R. MOO,
650 Associates Building,
South Bend 1, Indiana,
Of Counsel.

THE BLAKEMORE-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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IN THE MATTER OF:
RAINBO EXPRESS, INC.,
BANKRUPT.

JAMES B. RICHARDSON, TRUSTEE,
Petitioner and Appellant below,

vs.

NATIONAL ACCEPTANCE COMPANY OF CHICAGO,
Respondent and Appellee below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioner, James B. Richardson, Trustee in Bankruptcy, respectfully petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit and contemporaneously herewith files a duly certified Transcript of the Record in the case, as the same now appears in the United States Court of Appeals for the Seventh Circuit.

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.*

This is a bankruptcy proceeding in which the Respondent, National Acceptance Company of Chicago, Chicago, Illinois, sought (1) a determination of the bankrupt's indebtedness to it, (2) a determination of the amount of that indebtedness which was secured, and (3) possession of the security and leave to foreclose against it. The Referee in Bankruptcy on the 8th day of May, 1948, entered a decree fixing the amount of the bankrupt's indebtedness to the Respondent, adjudging that the Respondent had a first, valid and subsisting lien upon certain personal property of the bankrupt and also adjudging that the Respondent had a first, valid and subsisting lien upon the Certificates of Public Convenience and Necessity issued to the bankrupt by the Interstate Commerce Commission. The decree further denied the Petitioner's prayer for possession of the mortgage chattels and leave to foreclose against them. (R. 11, 12.) Two general creditors of the bankrupt estate filed a petition to review the decree as entered by the Referee in Bankruptcy and on August 2, 1948, the Honorable Luther M. Swygert, Judge of the District Court, sitting in bankruptcy, entered his order affirming the decree of the Referee. (R. 16.)

Thereafter and within the time afforded, your Petitioner perfected an appeal to the United States Court of Appeals for the Seventh Circuit at Chicago, Illinois, attacking so much of the decree of the Referee as determined that the Respondent, National Acceptance Company of

* References to the Transcript of Record filed contemporaneously herewith appear herein as (R. 1.), etc.

Chicago, had a first valid and subsisting lien as against the Trustee in Bankruptcy upon the bankrupt's Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission. (R. 17, 18.) On the 14th day of February, 1949, this appeal was heard by the Honorable J. Earl Major, Chief Judge; Honorable Otto Kerner, Circuit Judge and Honorable Sherman Minton, Circuit Judge. (R. 39.) Thereafter and on the 17th day of March, 1949, the Court of Appeals reversed the judgment below and remanded the cause with directions to proceed in accordance with the views expressed in an opinion filed by the Court on that same day. (R. 40, 48.) Subsequently, a rehearing was granted and the cause placed on the calendar of the Court for re-argument during the October, 1949, session. (R. 53.)

On the 7th day of November, 1949, the cause was reargued before the Honorable J. Earl Major, Chief Judge; Honorable Philip J. Finnegan, Circuit Judge and Honorable Walter C. Lindley, Circuit Judge. (R. 54.) Thereafter and on the 5th day of January, 1950, the United States Court of Appeals for the Seventh Circuit as thus constituted, entered a judgment withdrawing the original opinion of March 17, 1949, and all entries pursuant thereto and affirmed the decree and judgment of the lower court. (R. 55-63.) Subsequently and on the 10th day of February, 1950, your Petitioner's "Petition for Rehearing" was denied. (R. 64.)

There is no dispute as to the facts in this case. Shortly prior to November 15, 1946, the bankrupt and the Respondent orally agreed that Respondent would loan the sum of $58,000.00 to the bankrupt, for which the bankrupt was to pay $17,400.00 as interest over a period of three years. (R. 2.) This loan was to be secured by a chattel mortgage on all of the trucks, tractors, trailers, office furniture and fixtures and such other personal property as the bank-

rupt owned as well as a mortgage and assignment of the bankrupt's operating rights. (R. 2.) This agreement was consummated and the chattel mortgages contemplated thereby duly executed and recorded. (R. 2-8.) The sole issue presented to the Court of Appeals and to this Honorable Court is the force and effect, the validity of, the chattel mortgage on the bankrupt's I. C. C. Certificates as against the bankrupt's Trustee.

II.

JURISDICTIONAL STATEMENT.

The judgment of the United States Court of Appeals for the Seventh Circuit was duly entered on January 5, 1950. (R. 63.) The petition for rehearing was denied on the 10th day of February, 1950. (R. 64.) The jurisdiction of this Court is invoked under Title 11, U. S. Code, Section 47c, being Section 24c of the Act of Congress relating to Bankruptcy, as amended, reading as follows:

> "The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this title in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

and under the provisions of Title 28, U. S. Code, Section 1254, reading as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;".

III.

QUESTION PRESENTED.

The question herein presented is the validity of a mortgage given by a bankrupt on its Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission under Part II, Interstate Commerce Act as against the bankrupt's Trustee in Bankruptcy where no prior approval of the attempted mortgage was obtained from the Interstate Commerce Commission.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

1. The decision of said Court of Appeals by holding valid the Respondent's chattel mortgage on the bankrupt's Certificates as against the Trustee in Bankruptcy involves the determination of an important question of federal law which has not been, but should be settled by this Court.

2. The decision of said Court of Appeals as to the validity of Respondent's mortgage ignores the plain mandate of Congress in the organic Act creating Certificates of Public Convenience and Necessity, being Section 207 (b), Part II, Interstate Commerce Act, as amended, Title 49, U. S. Code, Section 307 (b), reading as follows:

> "No certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

and fails to give any force and effect to I. C. C. Rule 1(d),

Title 49, Ch. I B, Part 179.1(d), Code Federal Regulations, 1943 Supp., reading as follows:

> "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided. A transfer of operating rights by means of a pledge of such rights, or by the foreclosure of a pledge upon or lien against such rights, or by levy of execution in the satisfaction of any judgment or claim against the holder thereof, shall not be effective without compliance with these rules and regulations and the prior approval of the Commission."

3. The decision of said Court of Appeals by holding valid the Respondent's chattel mortgage is a decision of a federal question in a way probably in conflict with applicable decisions of this Court, and particularly with the decisions of this Honorable Court in *U. S.* v. *Resler,* 313 U. S. 57 (1941); *Thomas* v. *Railroad Company,* 101 U. S. 71, 83 (1880); and *Rochester Railway Company* v. *City of Rochester,* 205 U. S. 236 (1907).

4. The decision of said Court of Appeals as to the proprietary character of a Certificate of Public Convenience and Necessity by application of the so-called Board of Trade cases (*Hyde* v. *Woods,* 94 U. S. 523 (1877); *Page* v. *Edmunds,* 187 U. S. 596 (1903); *Board of Trade of the City of Chicago, et al.* v. *Johnson,* 264 U. S. 1 (1924)) is a misinterpretation and misapplication of those prior decisions rendered by this Honorable Court.

5. The weight afforded by the decision of said Court of Appeals to *First National Bank of Weatherford, Texas* v. *Holliday,* 47 Fed. (2d) 67 (C. C. A. 5, 1931), and a decision by the Tennessee Court of Appeals on October 14, 1949, in *Costello, et al.* v. *Acco Transport Co., et al.,* 7 Fed. Carrier Cases, Par. 80,566 (not otherwise published, so far as we are able to ascertain) (a case decided by an

inferior court of appeals in the State of Tennessee some seven months after the original opinion and decision of this matter by the said Court of Appeals as differently constituted) so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your Petitioner respectfully prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Court of Appeals for the Seventh Circuit, commanding said Court to certify and send to this Court a full and complete transcript of record and of the proceedings of the said Court had in the case numbered and entitled on its docket "No. 9717, *In the Matter of Rainbo Express, Inc., Bankrupt; James B. Richardson, Trustee, Appellant* v. *National Acceptance Company of Chicago, Appellee,*" to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States of America; and that the judgment herein of said United States Court of Appeals for the Seventh Circuit be reversed by this Honorable Court, and for such further relief as to this Court may seem proper.

Dated May 1, 1950.

JAMES B. RICHARDSON,
By ELI F. SEEBIRT,
Attorney for Petitioner.

ROBERT L. OARE,
PAUL R. MOO,
Of Counsel.

IN THE

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IN THE MATTER OF:
RAINBO EXPRESS, INC.,
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Petitioner and Appellant below,

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NATIONAL ACCEPTANCE COMPANY OF CHICAGO,
Respondent and Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINIONS OF COURTS BELOW.

The original opinion of the United States Court of Appeals for the Seventh Circuit is not reported, but appears in full at page 40 of the Transcript of Record filed contemporaneously with this petition. This original opinion was withdrawn. The opinion on rehearing of the matter, rendered January 5, 1950, is reported in 179 Fed. (2d) 1. This opinion is also printed in full in the Record. (R. 55-62.)

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 24 c of the Act of Congress Relating to Bankruptcy which vests this Court with jurisdiction to review judgments, decrees and orders of the United States Courts of Appeals in proceedings under the bankruptcy law in accordance with provisions of the laws of the United States in force generally. Under this statutory provision jurisdiction is particularly invoked under Title 28, U. S. Code, Section 1254. Final judgment was entered in this cause by the United States Court of Appeals for the Seventh Circuit on Janaury 5, 1950 (R. 63) and the petition for rehearing was denied on the 10th day of February, 1950. (R. 64.)

III.

STATEMENT OF THE CASE.

A summary statement of the matter involved on this petition has been made in the petition immediately preceding this brief and is hereby adopted and made a part of the brief herein. As previously stated, there are no contests or issues of fact involved in this case. The bankrupt trucking company borrowed $58,000.00 from the Respondent and executed a three year note in which it agreed to pay off this loan, together with $17,400.00 interest. The bankrupt defaulted on this obligation. (R. 9.)

There is no dispute concerning the validity of the chattel mortgage given by the bankrupt motor carrier upon certain of its personal property. There is further no dis-

pute as to the due execution and the proper recordation of the chattel mortgage attempting to pledge the bankrupt's Certificate of Public Convenience and Necessity to the Respondent. Nor is there any contention that the Respondent sought any approval from the Interstate Commerce Commission for the chattel mortgage attempting to pledge the bankrupt's operating rights.

Your Petitioner takes the position that the mortgage obtained by the Respondent on the bankrupt's Certificate of Public Convenience and Necessity issued by the Interstate Commerce Commission is not valid and enforceable as against your Petitioner, the Trustee in Bankruptcy, for the reasons and upon the grounds that (1) a Certificate of Public Convenience and Necessity issued to a motor carrier by the Interstate Commerce Commission is not personal property which can be effectively mortgaged as against the carrier's Trustee in Bankruptcy, and (2) even if it were property subject to mortgage, the prior approval of the Interstate Commerce Commission was required before the attempted transfer of the Certificate by mortgage could be effective against the Trustee in Bankruptcy in this matter.

IV.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

These have already been stated in the preceding Petition under Part IV, which is hereby adopted and made a part of this brief.

V.

ARGUMENT.

The decision of the Court of Appeals for the Seventh Circuit in this case has determined that a Certificate of Public Convenience and Necessity issued to a motor carrier by the Interstate Commerce Commission under Part II of the Interstate Commerce Act is subject to mortgage by the holder thereof without prior approval of the Interstate Commerce Commission. The decision holds that a motor carrier can effectively create a valid legal lien on its Certificates as against the carrier's trustee in bankruptcy. This question has never been determined, so far as we are able to learn, by this Honorable Court, nor has it been adjudicated by any other United States Court of Appeals. We are informed that a similar contest is in litigation in a federal district court in Massachusetts, but no final decision has been there obtained.

The question is necessarily and exclusively a matter of federal law. Certificates of Public Convenience and Necessity for the interstate carriage of persons and property were originally provided for in the Motor Carrier Act of 1935. This congressional enactment as subsequently amended, is now officially known as Part II of the Interstate Commerce Act. The Congress of the United States created these Certificates and it is only by virtue of the original Motor Carrier Act and its subsequent amendments that such Certificates exist. The character, the attributes, the infirmities and the extent of rights conferred by such Certificates are determinable only by an interpretation of and construction of the organic act of Congress by which such Certificates were created. The proper interpreta-

tion and construction of a federal statute is, of course, exclusively a federal question. Whether or not the Certificates issued to the bankrupt motor carrier in this proceeding possessed sufficient property attributes to permit their mortgageability is exclusively a federal question.

Likewise, the force and effect, the validity and the applicability of a certain regulation promulgated by the Interstate Commerce Commission under Part II of the Interstate Commerce Act is a question exclusively federal in character. Under the original Motor Carrier Act of 1935 and under the amendments thereto, the Interstate Commerce Commission has certain power and authority as to the promulgation of rules and regulations under Part II of the Interstate Commerce Act. In pursuance of that authority there was in existence at the time of the mortgage given by the bankrupt motor carrier in this proceeding a certain regulation which on its face and by its terms purported to apply to the instant proceeding. What vitality this regulation might have and what its effect upon the provisions of the basic legislation itself might be are exclusively questions of federal cognizance. This Court in *U. S.* v. *Resler,* 313 U. S. 57 (1941), held a similar rule (of which the regulation here involved is a successor) a valid exercise of the Commission's power. In that same opinion this Honorable Court determined that the prior approval of the Interstate Commerce Commission was by virtue of that regulation, an express condition precedent to a valid transfer of a Certificate. Except for that case, this Court has not determined the questions here involved.

Not only is the question of the interpretation of Part II of the Interstate Commerce Act a federal question, and not only is the vitality of the Interstate Commerce Commission rule involved and its relationship to the statute a federal question, but each and both of these federal matters

are of sufficient importance to require this Court in the exercise of its sound judicial discretion, to grant the writ of certiorari. It is a matter of judicial knowledge to this Honorable Court that the number of carriers engaged in the interstate transportation of persons and property, all of whom must hold Certificates similar to those involved in the present litigation, is virtually legion. As the economy of this country shrinks and expands the interests of motor carriers and the various financial institutions which supply capital for those operations are vitally concerned with an ultimate determination of this important question by this Court. If such Certificates are to be freely mortgageable, this is a most important determination for the carriers, various lenders and the public generally. If, on the other hand, this Honorable Court should, as Petitioner believes, hold that such Certificates are merely a personal privilege of the holder to be exercised so long as he shall comply with the various requirements of safe operation and adequate service to the general public, but without a *right* to confer his public privilege upon any other person, then, likewise, it is important that this determination be conclusively made by this Honorable Court so that certainty may prevail. As motor carriers are met with increasing competition by air freight and renewed competitive effort by the railroads, the financial adjustments required of the motor carrier industry will make a determination of the question herein presented one of increasing importance. Your Petitioner respectfully urges that regardless of the merits, this Court may feel its full responsibility for rendering an authoritative and elucidating decision as to the question involved on this appeal.

Not only does your Petitioner urge that the decision of the Court of Appeals should be reviewed because it is a question of exclusive federal cognizance which has not been, but should be, settled by this Court, but your Peti-

tioner further urges that certiorari be granted in this proceeding to give full effect to the legislative intention expressed by Congress when it created Certificates of Public Convenience and Necessity. It seems to your Petitioner that the decision of the Court of Appeals below has completely ignored the plain mandate of the Congress by overlooking the following positive statement in the legislation which gave existence to Certificates of Public Convenience and Necessity:

> "No Certificate issued under this chapter shall confer any proprietary or property rights in the use of the public highways."

Section 207 (b) Part II Interstate Commerce Act as amended, Title 49 U. S. Code, Sec. 307 (b).

The seemingly plain and unadulterated meaning of this language is that the holder of a Certificate to transport persons or property in interstate commerce does not have any property rights by virtue of his Certificate. Notwithstanding this plain mandate, the decision of the Court of Appeals below holds that a motor carrier has such a property interest in the use of the public highways that its license may be transferred by mortgage so as to create a valid legal lien on the operating rights granted to it by the I. C. C.

Furthermore, the decision of the court below ignores the unambiguous language of the Interstate Commerce Commission regulation that: "No attempted transfer of any operating right shall be effective except upon full compliance with these rules and regulations and until after the Interstate Commerce Commission has approved such transfer as herein provided. A transfer of operating rights by means of a pledge of such rights • • • shall not be effective without compliance with these rules and regulations and the prior approval of the Commission."

I. C. C. Rule 1(d), Title 49 Chapter I B, Part 179.1(d) Code Federal Regulations, 1943 Supp. Admittedly no approval of the Commission was sought or obtained for the purported transfer of the bankrupt's operating rights by mortgage to the Respondent, National Acceptance Company of Chicago.

Your Petitioner respectfully submits that the decision of the court below not only ignores, but is in direct conflict with, the express congressional mandate in Part II of the Interstate Commerce Act and the unambiguous regulation promulgated by the Commission under that Act. The exercise of this Court's power by granting review on this petition for certiorari appears amply justified by this record.

In addition to the reasons given above, your Petitioner submits that the decision of the Court of Appeals by holding valid the Respondent's chattel mortgage is a decision which is probably in conflict with the decisions of this Honorable Court in *U. S.* v. *Resler,* 313 U. S. 57 (1941); *Thomas* v. *Railroad Company,* 101 U. S. 71, 83 (1880); and *Rochester Railway Company* v. *City of Rochester,* 205 U. S. 236 (1907). In *U. S.* v. *Resler,* 313 U. S. 57 (1941), this Honorable Court held that the Commission's original Rule 1 (d), I. C. C. Rule 1 (d) 3 Fed. Reg. 2157 (July 1, 1938), was a valid exercise of the Commission's authority and that under that rule the approval of the Interstate Commerce Commission was a required *condition precedent* to a transfer of operating rights. In that case the defendant was charged with operating a motor carrier in interstate commerce without a Certificate. The defendant filed a plea in bar stating that he had acquired *by transfer* a Certificate of Public Convenience and Necessity from another person. This plea was held insufficient to defeat the criminal charge filed against the defendant. Following this decision, the Commission pursuant to Section 212 (b), Part II Inter-

state Commerce Act, as amended, Title 49, U. S. Code, Sec. 312 (b), issued its amended rule involved in this proceeding. Under this rule, which is a more explicit statement of the rule approved and construed by this Honorable Court in the *Resler* case, the prior approval of the Commission was continued as a requirement for transfer.

It is, of course, axiomatic that a mortgage to create a valid legal lien requires a transfer. "A chattel mortgage is *a conveyance* of some present legal or equitable right in personal property." 14 C. J. S. Tit. "Chattel Mortgages" Sec. 1; 10 Am. Jur. Tit. "Chattel Mortgages" Sec. 2. A chattel mortgage is "*a transfer* of personal property as security for a debt or obligation in such form that, upon failure of the mortgagor to comply with the terms of the contract, the title to the property will be in the mortgagee." Thomas, Mortgages, page 427.

The decision of the court below wholly ignores the rule of the *Resler* case and by some unexplainable theory, asserts that somehow the right to operate under a Certificate and the general ownership of the Certificate can be separated. The prevailing opinion of the court below on rehearing, as well as the authorities there cited, all freely admit, concede and assert that a holder of a permit can not transfer his right to operate a motor carrier in interstate commerce upon the public highways. Stated another way, the decision says a holder can transfer his Certificate, but the transferee can not operate under the Certificate until obtaining Interstate Commerce Commission approval. *If the holder can not transfer his right to conduct operations, then what does the purported "transfer" transfer?* The holder of a Certificate has the privilege of operating his trucks over the designated routes covered by his Certificate so long as he performs his public duties and complies with the safety and responsibility rules of the Interstate Commerce Commission. This privilege is all that a Certif-

icate confers upon the holder. He possesses nothing else by virtue of the Certificate. Admittedly, he can not transfer that. Then what does he have to transfer—by way of sale, mortgage, lease or otherwise?

Furthermore, the prevailing opinion of the Court of Appeals below has ignored the doctrine announced and followed by this Honorable Court in *Thomas* v. *Railroad Company,* 101 U. S. 71, 83 (1880), and *Rochester Railway Company* v. *City of Rochester,* 205 U. S. 236, 247 (1907). The original opinion below by Judges Major, Kerner and Minton (R. 44, 45) carefully applied those cases to their complete analyzation of the important questions raised by the appeal. As this Honorable Court said in *Thomas* v. *Railroad Company,* 101 U. S. 71, 83 (1880), a transfer of a franchise without the consent of the state "is a violation of the contract with the state, and is void as against public policy." Or, more explicitly, as this Honorable Court pointed out in *Rochester Railway Company* v. *City of Rochester,* 205 U. S. 236 (1907), at page 247: "The person with whom the contract is made by the state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end and he can not by any form of conveyance transmit the contract or its benefits, to a successor." Paraphrasing this principle, it is accurate and fair to state that the holder of a Certificate may continue to enjoy its benefits unmolested as long as he chooses and performs his public obligations, but there his rights end, and he can not by any form of instrument, mortgage the Certificate so as to give another person a valid legal lien thereon.

It further seems to your Petitioner that the final decision of the court below misinterprets and misapplies the so-called Board of Trade cases decided by this Honorable Court. Those case are *Hyde* v. *Woods,* 94 U. S. 523 (1877); *Page* v. *Edmunds,* 187 U. S. 596 (1903); and *Board of*

Trade of the City of Chicago, et al. v. *Johnson,* 264 U. S. 1 (1924). The court below states that these cases held that various Board of Trade memberships were "transferable property" notwithstanding the numerous restrictions upon the member's right to sell in the absence of approval by certain designated authority. The court below further stated that these decisions held that the memberships involved passed to the trustee in bankruptcy because they were property capable of being transferred by the bankrupt prior to adjudication. Then applying these cases to its decision, says, "The same reasoning applied to the situation before us strongly indicates that a Certificate is transferable property, and if so, it is subject to sale or mortgage. The transferee, however, would acquire the right to operate under the Certificate only upon approval by the Commission."

It is, of course, perfectly evident that the so-called Board of Trade cases do hold that a seat on a Board of Trade passes to a trustee in bankruptcy under Section 70 of the Bankruptcy Act. But this holding does not mean, nor require, nor logically lead to the conclusion, that they are property subject to mortgage. To paraphrase the decision below, the Board of Trade cases are applied as follows: (1) Under Section 70 (a)(5) of the Bankruptcy Act property which the owner could by any means have transferred passes to the trustee; (2) If an asset passes to a trustee in bankruptcy it must be property and thus subject to mortgage; (3) Since the Certificate held by the bankrupt passed to the trustee, it is mortgageable. While it is true that a Certificate passes to a trustee in bankruptcy by operation of law, it is misleading and confounding to attach the label "transferable" to such a fact. To be transferable ordinarily means to have a character of assignability or negotiability so that a thing may be passed from one person to another carrying with it all the rights of the first person. Transferability also connotes action

of a voluntary character. Death and bankruptcy do not involve any "transfer" of things, but rather a succession of administrator or trustee in the place of, in the stead of the deceased or the bankrupt. The Bankruptcy Act does not speak of the "transfer" of the bankrupt's property to the trustee. Section 70 says: "The trustee * * * shall * * * be vested by operation of law with the title of the bankrupt, etc." The use of the labels "transfer" and "transferable" lead directly to the erroneous result which Petitioner respectfully submits was reached below. That a particular asset passes to a trustee in bankruptcy does not make that asset property subject to mortgage. This exact holding was reached in *Tracy* v. *Ginzberg,* 75 N. E. 637 (Mass. 1905) aff'd. 205 U. S. 170 (1907); *In re Flaherty,* 184 Fed. 962 (E. D. Va. 1911); and *In re McArdle,* 126 Fed. 442 (D. Mass., 1903), all involving liquor licenses.

Furthermore, the fallacy of the reasoning by the court below is demonstrated in *Board of Trade* v. *Johnson,* 264 U. S. 1 (1924), itself. In discussing the previous case of *Page* v. *Edmunds,* 187 U. S. 596 (1903), this Honorable Court in the *Johnson* case said: "It declined to limit the definition of property under sub-division (5) to such as the state courts might hold could be seized in execution by judicial process. Sub-division (3), vesting in the trustee title to powers which the bankrupt might exercise for his own benefit, manifests a purpose to make the assets of the estate broadly inclusive. By a construction not unduly strained, sub-division (3) might be held to include a power to transfer a seat on the exchange subject to its rules, if it were necessary." Your Petitioner respectfully submits that in no prior decision has this Honorable Court ever approved or adopted the fallacious syllogism derived by the court below from the so-called Board of Trade cases. On the contrary, in the *Johnson* case this Court by implication if not expressly, refused to accept the reasoning adopted by the court below.

In addition to a general misinterpretation and misapplication of the so-called Board of Trade cases taken as a whole, the decision below misconstrues and misapplies another facet of the *Johnson* case. The decision below says that in the *Johnson* case this Court held as to the Board of Trade membership "that title passed to the trustee subject to the existing lien." Under the rules of the Chicago Board of Trade members could object to a transfer of a seat until the transferor's obligations were satisfied. This was a contract right and an essential attribute or characteristic of the member's seat. No "lien" claimants existed in the *Johnson* case, and the claimants were merely asserting rights given them under the rules of the exchange and not by any pledge or mortgage or other "transfer" by the holder of the seat. This Court recognized that fact when at page 15 it said: "The lien, if it can be called such * * *."

In addition to the reasons heretofore given by your Petitioner for the granting of certiorari, it is respectfully submitted that the weight afforded certain cases by the decision below departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The first of these decisions relied upon by the court below is *First National Bank of Weatherford, Texas* v. *Holliday*, 47 F. (2d) 67 (C. C. A. 5, 1931). The opinion below says that this case "squarely supports" Respondent's position. In the *Holliday* case a bank foreclosed on certain Texas Certificates. After the foreclosure, but prior to the execution sale, the mortgagor was declared a bankrupt. The trustee in bankruptcy sought to enjoin the execution sale on the sole vague ground of public policy. As the court itself stated in framing the issue of that case: "Upon the merits of the appeal, a simple question of law is presented, whether any public policy exists which defeats *appellant's otherwise valid lien.*" (Italics added.) In that proceeding the trustee in

bankruptcy did not question, the court in its deliberations did not consider, and the opinion did not discuss the *validity of the mortgage itself*. Certainly such a decision does not "squarely support" Respondent's contentions in this proceeding.

Another decision heavily relied upon by the court on its final opinion was *Costello, et al.* v. *Acco Transport Company, et al.*, 7 Fed. Carrier Cases, Par. 80,566 (October 14, 1949) (not otherwise reported). That decision by an inferior court of appeals in the State of Tennessee was decided some seven months after the original decision in the instant proceeding and is still pending on certiorari to the Supreme Court of the State of Tennessee. That decision is not "well reasoned" and does not "squarely support" Respondent's contentions in the instant proceeding. The case did not involve the superior rights of innocent third parties or a trustee in bankruptcy. The contest there was between the mortgagee and persons privy to the mortgagor with full knowledge of the mortgage. Sound reasons for sustaining the result probably exist. In the instant proceeding, however, Respondent claims by virtue of its mortgage, rights superior to and in preference over the general creditors of the bankrupt and as such a claimant must show a perfected valid legal lien prior to the bankruptcy proceeding in order to prevail.

Furthermore, the *Costello* case is the result of three erroneous basic tenets: (1) The fallacious assumption that if such Certificates pass to a trustee in bankruptcy, they must be "transferable" property; (2) *Breeding Motor Freight Lines, Inc.* v. *R. F. C., et al.*, 172 F. (2d) 416 (C. C. A. 10, 1949), and *Watson Brothers Transportation Co., Inc.* v. *Jaffa, et al.*, 143 F. (2d) 340 (C. C. A. 8, 1944), are authoritative; and (3) The right to operate under a Certificate and the general ownership of that Certificate can somehow be separated. The first and third bases have previously been mentioned in this brief and the second tenet

is erroneous in that neither of the two cases is authoritative. (The decision of the court below in this proceeding also relies independently upon those cases.) In the *Breeding* case, the question was not the validity of the mortgage, but whether or not the original note and mortgages were "securities" within the meaning of certain provisions of the Interstate Commerce Act. In the *Jaffa* case specific performance of an agreement to transfer a Certificate was sought. As the court below in its original opinion so succinctly stated in discussing the *Jaffa* case, even assuming that performance of the agreement between the bankrupt and the Respondent here could have been required of the bankrupt, "it does not follow that the (Respondent) acquired a lien on the operating rights valid as against the trustee in bankruptcy" (R. 47).

The bald assertions by the court below that the *Holliday* and *Costello* cases are precise authorities without any analyzation thereof and the failure of the decision on rehearing to meet the specific problems raised and decided by the court as differently constituted on the original hearing of the cause so far departs from the accepted and usual course of judicial proceedings as in the opinion of this Petitioner to call for an exercise of this Court's power of supervision over the Courts of Appeals.

For all of the reasons stated above and in the petition supported by this brief, it is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its sound judicial discretion by granting the writ of certiorari herewith requested and thereafter reviewing and reversing the decision of the Court of Appeals below.

Respectfully submitted,

ELI F. SEEBIRT,
Attorney for Petitioner.

ROBERT L. OARE,
PAUL R. MOO,
Of Counsel.